85-2910

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FELIX S. JACOB,

Appellant,

v.

UNITED STATES,

Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FELIX S. JACOB,
202 Executive Building,
22 West Road,
Towson, Maryland 21204,
(301) 583-7444,
In Proper Person.

The Daily Record Co., Baltimore, MD 21202



13pp

QUESTION PRESENTED

Did the Court of Appeals for the Fourth Circuit err in denying Petitioner's motion pursuant to 28 U.S.C. § 2255, alleging ineffective assistance of counsel on the ground that Petitioner was not entitled to again waive or assert his right to a jury trial after the Government was permitted to amend the information against him after the close of the case and that counsel was therefore not ineffective in failing to advise him of such a right?

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OPINIONS BELOW

The *Per Curiam* opinion of the Court of Appeals for the Fourth Circuit is unpublished. It appears in full at 1a.

GROUNDS FOR INVOKING THE JURISDICTION OF THE SUPREME COURT

Petitioner seeks review of the order of the United States Court of Appeals for the Fourth Circuit entered on May 28, 1985, in case number M-84-4624 affirming the District Court's denial of Petitioner's motion pursuant to 28 U.S.C. § 2255. The jurisdiction of the Supreme Court is invoked

pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 17(c).

STATEMENT OF THE CASE

On June 11, 1980, the Government filed an information against Petitioner alleging violation of 18 U.S.C. § 7206(1) (subscribing to a false income tax return). On January 26, 1982, Petitioner waived indictment, waived a jury trial and entered a plea of not guilty. Petitioner had previously entered into a stipulation with the Government by which it was agreed that no evidence other than the stipulation would be offered by either party at trial. Petitioner waived a jury trial and the stipulation was introduced at trial; the Government closed its case and Petitioner moved for a judgment of acquittal. On January 27, 1982, the Government moved for leave to amend the information, which motion was granted and Petitioner's motion for judgment of acquittal was denied. District Judge Miller then entered a verdict of guilty against Petitioner and imposed sentence.

Prior to trial, Petitioner's attorney, Sheldon H. Braiterman, Esquire, persuaded him to waive a jury trial on the assurance that a motion for acquittal at the close of the Government's case would be granted. When the Government was granted leave to amend and the motion for acquittal was denied, Petitioner's attorney failed to advise him that he would have a right to demand or request a jury trial on the amended charge. Had Petitioner realized that he had such a right, he would have demanded a trial by jury.

For these reasons, Petitioner, in 1985, filed a motion pursuant to 28 U.S.C. § 2255 in the District Court of Maryland alleging a denial of Petitioner's Sixth Amendment right to effective assistance of counsel. The District Court denied the motion without opinion and appeal was

taken to the Fourth Circuit in which the District Court judgment was affirmed (Unpublished, No. 85-6082, May 28, 1985).

ARGUMENT

I.

PETITIONER HAD A RIGHT TO DEMAND A JURY TRIAL AFTER THE GOVERNMENT WAS GRANTED LEAVE TO AMEND.

Under the factual circumstances of this case, if Petitioner had requested that his prior waiver of a jury trial be withdrawn after leave to amend this information was granted, it would have been error for the District Court Judge not to have granted the motion. Since there was an agreement that no evidence other than the stipulation would be entered into evidence, the objection to withdrawal of the waiver raised in *U.S. v. Sadrzadeh,* 440 F.2d 389 (9th Cir., 1971), i.e. that starting all over again with a jury would waste a great deal of the court's time. Nor is it a case such as *U.S. v. Holmen,* 586 F.2d 332 (4th Cir., 1978) in which witnesses who lived in distant places had been subpoened and could not be notified in time to have stopped them from attending on the previously scheduled date. Given that Petitioner's initial waiver of a jury trial was premised upon erroneous assurances given him by counsel that the case would be dismissed due to a defect in the indictment, and that empanelling a jury would not have been burdensome for the court nor would it have inconvenienced any witness, would have been an abuse of discretion for the court to have denied a motion to withdraw the waiver under the circumstances.

II.

COUNSEL'S FAILURE TO ADVISE PETITIONER OF HIS RIGHT TO REQUEST A TRIAL BY JURY DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In *Strickland v. Washington*, ___ U.S. ___, 104 S. Ct. 2052 (1984), the Supreme Court held that the standard to be applied in assessing claims of ineffective assistance of counsel is that of "reasonably effective" assistance, i.e., it must be shown that counsel's performance was deficient and that the deficient performance prejudiced the defense. The error asserted in the present case is the failure of Petitioner's counsel to object to the case proceeding without a jury after leave to amend the information was granted or to advise Petitioner that he had a right to request that this waiver of a jury trial be withdrawn.

In *Strickland*, the Court stated that, "The reasonableness of counsel's actions may be determined or substantially influenced by defendant's own statements or actions. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions as it may be to a proper assessment of counsel's other litigation decisions." ___ U.S. ___, 104 S. Ct. at 2066. In assessing the reasonableness of counsel's omission to act in the present case, it must be kept in mind that the Sunday before trial, Defendant had indicated his desire for a jury trial to his counsel, Mr. Braiterman, but was dissuaded by counsel's assurances that the defect in the information would be grounds for acquittal. When Judge Miller granted the Government leave to amend, counsel, given his knowledge of Petitioner's desire for a jury trial, should at that time have requested that a jury be empanelled to hear the case or at least have advised Defendant of his right to do so. Counsel's performance was clearly deficient in this regard.

The second prong of the test requires showing that counsel's errors prejudiced the defendant. Here counsel's errors deprived Petitioner of an opportunity to have his case heard by a jury, a fundamental right.

For these reasons, the judgment of the Court of Appeals for the Fourth Circuit affirming the decision of the District Court based on a finding of no deprivation of the right to effective assistance of counsel is erroneous and should be reversed by this court.

Respectfully submitted,

FELIX S. JACOB,
202 Executive Building,
22 West Road,
Towson, Maryland 21204,
(301) 583-7444,
In Proper Person.

United States Court of Appeals
for the Fourth Circuit

No. 84-6520

United States of America,

Appellee,

versus

Felix S. Jacob,

Appellant.

No. 85-6082

United States of America,

Appellee,

versus

Felix S. Jacob,

Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. James R. Miller, Jr., District Judge. (Cr. No. M-80-0237)

Submitted: March 21, 1985 *Decided: May 28, 1985*

Before MURNAGHAN and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

(Felix S. Jacob, Appellant Pro Se. Herbert Better, Assistant United States Attorney, for Appellee in No. 84-6520; Stephen Immelt, Assistant United States Attorney, for Appellee in No. 85-6082)

PER CURIAM:

Felix S. Jacob, convicted in 1982 of filing a false 1975 individual federal income tax return, appeals from two orders of the district court denying relief under Fed. R. Crim. P. 35(b) and under 28 U.S.C. § 2255. We affirm the judgment of the district court denying § 2255 relief and dismiss Jacob's appeal from the denial of his Rule 35 motion.

Jacob first moved for a reduction of sentence under Rule 35(b) on April 5, 1984. This motion was denied on April 27, 1984. On May 31, 1984, Jacob moved for reconsideration of this denial, and his motion for reconsideration was denied the same day. On June 27, 1984, Jacob again moved for reconsideration of the denial of Rule 35(b) relief, and the renewed motion for reconsideration was denied on July 12, 1984. This denial was entered in the criminal docket on July 13, 1984, and it is from this denial that Jacob noted his appeal on August 10, 1984.

Under Fed. R. App. P. 4(b), a notice of appeal must be filed within ten days of entry of an order in the criminal docket. As Jacob failed so to note his appeal, it is untimely. *See United States v. Scott,* 672 F.2d 454 (5th Cir. 1982). While Rule 4(b) does permit a thirty day extension of the appeal period upon a showing of excusable neglect, we perceive no need to remand this case to the district court for a determination of excusable neglect because the district court did not abuse its discretion in declining to reduce Jacob's sentence. Since denial of a Rule 35(b) motion is reversible only for a clear abuse of discretion, *United States v. Stumpf,* 476 F.2d 945 (4th Cir. 1973), Jacob's appeal, even if timely, would be without merit.

With regard to Jacob's 28 U.S.C. § 2255 motion, we agree with the district court that because the amendment of Jacob's information did not introduce a new charge,

Jacob, having waived trial by jury prior to the amendment, was not entitled again to be advised and assert or waive his right to a jury after the amendment. *See United States v. Jacob,* No. 82-5075 (4th Cir., Sept. 30, 1983) (unpublished), *cert. denied,* ___ U.S. ___, 52 U.S.L.W. 3701 (March 26, 1984). As Jacob was not entitled again to assert or waive his right to a jury trial, his counsel was not ineffective in failing to inform him of such a right or in failing to move the district court to advise him of such a right. *See Strickland v. Washington,* ___ U.S. ___, 52 U.S.L.W. 4565 (May 14, 1984).

We accordingly affirm the district court's denial of Jacob's § 2255 motion and dismiss as untimely Jacob's appeal from the denial of a sentence reduction. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument.